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SUPREME COURT U. S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-148

NORMAN ROTHMAN and
FABIO DOMENICO DECRISTOFARO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NICHOLAS J. CAPUANO
10 West Flagler Street
Miami, Florida 33130
Attorney for Petitioners

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners herein, Norman Rothman and Fabio Domenico Decristofaro, by and through their undersigned attorney, respectfully pray this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on the 15th day of June, 1972, and the order of the same Court denying their timely petition for rehearing entered on the 5th day of July, 1972.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Second Circuit is found in Appendix A hereof and the order denying rehearing is found in Appendix B hereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37 (2) (c) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Second Circuit rendered its opinion in this cause on the 15th day of June, 1972. (Appendix A.). Petitioners filed their timely petition for rehearing (Appendix C.), and on the 5th day of July, 1972, the Court entered its order, without opinion, in and by which such petition for rehearing was denied. (Appendix B.).

QUESTIONS PRESENTED

I

Whether or not the trial court erred in granting the government's motion to compel certain handwriting exemplars of the defendant Norman Rothman, upon the ground that the taking and introduction of such exemplars at a critical stage of the proceedings (that is to say on the day of trial and immediately prior to the jury being selected), violated the defendant Rothman's Fourth Amendment privilege against unlawful searches and seizures and violated his Fifth Amendment privilege against self-incrimination.

II

Whether or not the trial court erred in failing to declare a mistrial because of the prejudicial misconduct of the prosecuting attorney in his opening statement that the defendants and co-conspirators, Chester Gray and Glysson Lawrence Mitchell, had pled guilty to the indictment and would testify for the government as to their conspiring with the two remaining defendants Rothman and Decristofaro.

III

Whether or not the trial judge by way of explanation at the time he charged the jury, erred in failing to give the jury the required cautionary instructions that a plea of a co-defendant or co-conspirator is inadmissible as evidence, and that such pleas do not give rise to any inference as to the guilt of the remaining defendants on trial.

STATUTES AND RULES INVOLVED

United States Constitution, Fourth and Fifth Amendment; Title 18 U.S. Code, Sections 371 and 14; Title 18 U.S. Code, Sec. 659 and 2; Title 18 U.S. Code, Sec. 1708 and 2; Title 18 U.S. Code, Sec. 2314 and 2, and Title 28 U.S. Code, Sec. 1291; Fed. Rule Crim. P. 52 (b).

STATEMENT OF THE CASE

On the 18th day of December, 1969, a Grand Jury in the Southern District of New York returned a multi-count indictment charging the Petitioners Norman Rothman and

Fabio Domenico Decristofaro, (together with Glysson Lawrence Mitchell, Chester Zochowski, a/k/a Chester Gray and Arthur Tortorello) with one count of conspiracy to transport in interstate and foreign commerce securities and money of value in excess of Five Thousand ($5,000.00) Dollars, knowing such securities to have been stolen, converted and taken by fraud in violation of Title 18, United States Code, Section 371, and fourteen (14) substantive counts in violation of Title 18, United States Code, Section 2314 and 2, Section 659 and 2 and Section 1708 and 2.

On November 17, 1971, the trial commenced before the Honorable Edward C. McLean and was concluded on November 22, 1971, with a jury verdict of Guilty as to the Petitioner ROTHMAN, on Counts 1, 3, 4, 7, 10, 14 and 15, and with a jury verdict of Guilty as to the Petitioner DECRISTOFARO on Counts 1, 14 and 15.

At the opening of the trial, the Government withdrew counts numbered 2, 5, 6, 8, 9, 11, 12 and 13.

On January 7, 1972, the Petitioner ROTHMAN was sentenced to imprisonment for a period of five (5) years on each of such counts to run concurrently with each other and on January 14, 1972, he duly filed his Notice of Appeal.

On January 7, 1972, the Petitioner DECRISTOFARO was sentenced to imprisonment for a period of three (3) years on each of such counts to run concurrently with each other and on January 13, 1972, he duly filed his Notice of Appeal.

STATEMENT OF THE FACTS

On November 17, 1971, the day of the trial and just prior to the jury being impaneled, the Government moved the Court by way of written motion for an Order directing the Petitioner ROTHMAN, to execute handwriting exemplars, which motion was granted by the Court.

On pain of contempt, and at a critical stage of the proceedings that is to say, on the day of the trial, and immediately prior to the jury being impaneled, the Petitioner ROTHMAN, was compelled over the violent objection of his counsel, not only to give a handwriting sample of his name, but was also compelled to give handwriting samples of the following names:

ED FIELDS

ED FISHER

NAT ROSSMAN

FRANK DINO

LOUIS FREIDMAN

It then appears, that as soon as the jury was impaneled to try the cause, the Court directed Government counsel to make his opening statement, to which counsel replied:

> "MR. GROSS: Your Honor, members of the jury: My name is John Gross. I am an assistant United States attorney. With me at counsel table will be David Brodsky, also an assistant United States attorney.

We will present the case for the United States.

The defendant, Norman Rothman and Fabio de-Cristofaro, are charged, along with Lawrence Mitchell and Chester Gray, with conspiring to transport approximately $3,000,000 of stolen securities across state lines and to Europe.

They also are charged with causing the transportation of certain stolen securities across state lines.

CHESTER GRAY and LAWRENCE MITCHELL have already pleaded guilty to conspiring with these defendants". (Emphasis added)

MR. LURIE: We object to that statement, if the court please, and ask for a mistrial.

THE COURT: The motion is denied and the objection is overruled. Let's get the ground rules straight. I understand Mr. Brodsky is representing Mr. Rothman and I don't want Mr. Lurie hopping up and making objections.

MR. GROSS: Both Mr. Gray and Mr. Mitchell will testify for the government and detail for you their participation in this conspiracy and the participation in the conspiracy of the defendants, Norman Rothman and Fabio de Christofaro". (Emphasis added)

At the conclusion of the case, the Court in its instructions to the jury charged them as follows:

"... In considering the testimony of Mr. Gray and Mr. Mitchell you should bear in mind that on their own testimony each of them was an accomplice in the commission of a crime. The testimony of an accomplice is to be scrutinized with great care, with close and searching scrutiny. If, however, after scrutinizing it you believe it, you are entitled to take that testimony into account just as you take into account any other testimony that you believe."

"... So much for general remarks. What is this case all about? I should explain to you that this indictment originally named five defendants. One of them is a man called Arthur Tortorello, about whom we know absolutely nothing. His case was severed, that is, cut off from all the others a long time ago before this case was ever even assigned to me. And I know nothing about him nor do you, and we don't have to concern ourselves with him at all. I only mention him because I wouldn't want you to wonder if you saw his name in the indictment. But we don't know anything about him and he is not on trial.

Now, the other four named in the indictment are Mr. Rothman, Mr. Mitchell, Mr. Gray and Mr. DeCristofaro. *As has been mentioned before, Mr. Mitchell and Mr. Gray have pleaded guilty to certain counts in the indictment and so they are no longer on trial. That leaves Mr. Rothman and Mr. DeCristofaro.*"

REASONS FOR GRANTING THE WRIT OF CERTIORARI

It is respectfully submitted that the Writ sought by your Petitioners should be granted for the reasons that the United States Court of Appeals for the Second Circuit failed and refused to properly apply to the facts in this case the law as set down by this Court in *Gilbert v. California*, 388 U.S. 263, decided June 12, 1967.

The "critical stage" in the adversary process is that point at which the guilt/innocence of the accused is foreclosed by the evidence obtained so that later events will not change the result, if his constitutional rights are asserted.

To understand the ruling in *Gilbert v. California*, supra, one must, of necessity, first understand the facts, which the Second Circuit, completely ignored, overlooked and refused to consider, and which briefly, are as follows:

Gilbert was convicted of armed robbery of a Savings and Loan Association in Alhambra, California, on January 3rd and the murder of a police officer who entered during the course of the robbery.

After the January 3rd robbery, Gilbert removed himself from California and was arrested in Philadelphia, Pennsylvania on February 26. He refused to answer any questions about the Alhambra robbery, but later, did answer questions about some Philadelphia robberies in which the robber used a handwritten note demanding that money be handed over to him, and during the later interrogation gave the FBI agent the handwriting exemplars.

The exemplars were admitted in evidence at trial over objection that they were obtained in violation of Gilbert's fifth and sixth amendment rights.

The California Supreme Court upheld admission of the exemplars on the *sole* ground that Gilbert had waived any rights that he might have had not to furnish them.

The California Supreme Court did not, therefore, decide Gilbert's constitutional claims.

The Supreme Court of the United States passed the question of waiver since it concluded that the taking of the exemplars violated none of Gilbert's constitutional rights because:

> FIRST, Gilbert *voluntarily* executed the handwriting exemplars.
>
> SECOND, Gilbert was a suspect, not a defendant when he executed the handwriting exemplars, and
>
> THIRD, the taking of the handwriting exemplars was not a critical stage of the proceedings.

In the present case, the narrow legal issue raised here then is whether the Fourth Amendment privilege against unlawful searches and seizures, and the Fifth Amendment privilege against self-incrimination is violated by compelling ROTHMAN *at a critical stage of the proceedings*, that is to say, on the day of trial and immediately prior to the jury being selected, to execute not only a handwriting sample of his own name, but to execute handwriting samples of five other names.

The case which best summarizes the view I here suggest is *United States v. Green*, 282 F. Supp. 373, which involved a factual situation very similar to the one at bar.

The case was before the Court on the Government's motion to require the defendant to submit handwriting exemplars. The motion requested that the handwriting exemplars include the names which the defendant allegedly wrote on the credit invoices used in the alleged conspiracy.

It was the position of the Government (as here) that the giving of handwriting exemplars is outside the scope of the Fifth Amendment privilege against self-incrimination. In support of its contention, the Government relied on *Schmerber v. State of California*, 384 U.S. 757 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966), and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967).

In denying the Government's motion to require Green to submit handwriting exemplars, the Court stated in part:

> (3) For the sake of analysis, assume the hypothetical of a man charged with forging his name to a gasoline sales receipt. If he were asked outright whether he had forged the name appearing on the receipt, there is no question that he could refuse to answer because of the constitutional privilege against self-incrimination. If rather than request a verbal response, the examiner told him to write his reply, the privilege would still prevail. Is the question presently confronting this court, i.e., can the examiner tell him to write the name as it appears on the sales receipt any different? Defendant urges that with the exactness and definiteness that can now be scientifically ob-

tained by handwriting analysis, the result of requiring the accused to write the name would have the same far-reaching effect as if the accused were required to make a verbal or written admission. Such result fails to satisfy the principle that the protestation is as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 110 (1892).

(4,5) * * * What is here sought is an exemplar displaying selected phrases allegedly germane to this case. To lend the compulsory processes of the Court to the procurement of such an exemplar without the voluntary cooperation of the accused would be an infringement upon the spirit of the constitutional prohibition against compelling the accused to be a witness against himself.

If, compelling the Petitioner ROTHMAN, on the day of his trial to furnish the Government with handwriting exemplars is not a critical stage of the proceedings, then it is respectfully requested of this Court to answer the question "When does it become a critical stage of the proceedings?"

The Second Circuit was asked the same question. The Court deliberately avoided answering it by simply ignoring to mention it in its opinion.

In *Mara v. United States*, 454 F.2d 580 (7th Cir.), the government moved by petition for an order directing petitioner to furnish exemplars of his handwriting and printing as grand jury deemed necessary.

The United States District Court for the Northern District of Illinois ordered petitioner to furnish exemplars and, when petitioner refused to obey order, he was adjudged in contempt and committed to custody until such time as he should obey order and he appealed.

In reversing the contempt judgment, The Court of Appeals stated on page 582:

> "Under our opinion in In re Dionisio 442 F. 2d 276 (7th Cir. 1971) (per curiam), it is plain that compelling petitioner to furnish exemplars of his handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its reasonableness requirement.
>
> Since a warrant was not involved, this seizure is to be tested by reasonableness rather than by probable cause. In re Dionisio, supra at 280."

Upon information and belief, certiorari has been granted by this Court in the *Mara* case, supra, and in In re Dionisio, on May 30th, 1972.

In the Matter of the Grand Jury Impaneled November 4, 1970, *Dean Riccardi*, Witness, 337 F.Supp. 253 (1972), the matter was before the United States District Court, D. New Jersey, pursuant to the government's application for an order compelling a Grand Jury witness to furnish handwriting exemplars.

The prime issue raised is whether the order would, if granted, contravene the witness's Fourth Amendment rights to be free from unreasonable searches and seizures.

In denying the application, the Court said:

"* * * Because a handwriting exemplar is physical evidence it falls without the strictures of the Fifth Amendment. Gilbert v. California, supra. Such a distinction has not gone without criticism. United States v. Green, 282 F. Supp. 373 (S.D.Ind.1968). I, likewise, find it difficult to draw a meaningful constitutional distinction based upon the Fifth Amendment between a coerced confession coming from an accused's mouth and one coming from his hand.

In Davis v. Mississippi, 394 U.S. 721, 89 S.Ct 1394, 22 L.Ed 2d 676 (1969), the Court held that fingerprint evidence, an element of an individual's physical characteristics, should not have been admitted into evidence since it had been obtained under unreasonable circumstances thus violating the Fourth Amendment.

This Court is in agreement with the foregoing authorities and holds that the Fourth Amendment must be consulted where the government applies for an order to compel the taking of handwriting exemplars.

This Court is impressed with the fact that if the exemplars taken matched the forgeries, then Riccardi would have been compelled by order of this Court to prove the very body of the crime alleged, viz: forgery of credit cards."

So then, if compelling the Petitioner Rothman, on the day of his trial to furnish the Government with not only a handwriting sample of his own name, but to execute a handwriting sample of five other names is not unreason-

able and in violation of his Fourth Amendment privilege, then there is nothing to prevent the Government, during a trial, and in the presence of the jury, to require and compel a defendant to execute the exemplars they demand.

Turning to the other legal issue raised here, it appears that the Second Circuit affirmed the trial court's verdict solely on the basis that the defendants failed to request the cautionary charge, completely overlooking, ignoring, and failing to consider, or for that matter to even mention any of the case cited by Petitioners in their brief and again during oral argument to-wit: that unless cautionary instructions are given to the jury that a plea of a co-conspirator or co-defendant is not admissible as evidence against the remaining defendants and that such pleas do not give rise to any inference as to the guilt of the remaining defendants on trial; that in each of such cases the failure to give the required cautionary charge was held to be error and a new trial was ordered. *Freije v. U.S.*, 386 F.2d 408 (1st Cir. 1967); *Chavez v. U.S.*, 275 F.2d 813 (9th Cir.); *Babb v. U.S.*, 218 F.2d 538 (5th Cir. 1955); *U.S. v. Baete*, 414 F.2d 782 (5th Cir. 1969); *U.S. v. Washabaugh*, 442 F.2d 1127 (9th Cir. 1971); *Leonard v. U.S.*, 277 F.2d 834; *U.S. v. Crosby*, 294 F.2d 928 (2d Cir. 1961); *U.S. v. Kahn*, 381 F.2d 824 (7th Cir. 1967); *U.S. v. Jones*, 425 F.2d 1048 (9th Cir. 1970).

None of the above cited cases, nor any of the other cases researched by this writer ordain that the burden is placed on the defendant to request a cautionary charge that a plea of a co-defendant or co-conspirator is not admissible as evidence against the remaining defendants, and that in the absence of such a request *by the defendant*, constitutes a waiver of that right by the defendant.

This writer is not aware of any law that requires a *defendant* to correct the errors committed by the *Government* during trial, and in failing to do so constitutes a waiver of that right to challenge it on appeal.

In *Freije*, supra, the court said:

> "It is generally held that it is proper to receive the guilty plea of a co-defendant, even in the presence of the jury, *but this presupposes that cautionary instructions are given.*
>
> *In this instance, although the trial judge referred to the plea in his charge, he did not give the usual cautionary instructions. It is surprising that defendants did not object to this procedure since it is well established that a plea of a co-defendant is not admissible as evidence against the remaining defendants.*
>
> *While not here deciding whether there was plain error within the meaning of Fed.R.Crim.P.52(b), we take occasion to mention this matter for the court's guidance in the new trial of this case.*"

In *Chavez v. United States*, 275 F.2d 813, 818 (9th Cir.) the court stated:

> "The law has long recognized the fact that it is difficult when in the courtroom for anyone, juror or not, to disregard that which he has heard. Yet, if evidence is improperly placed before the jury, the least a defendant can expect from the trial judge in correcting the error is a firm, definite, and unequivocal instruction to the jury that it is their duty to disregard it, absolutely and completely, and that it is his opinion they can and must do so.

> While the above statement had reference to evidence improperly placed before the jury, it applies with equal force to the opening statement of the character made in the instant case."

It is respectfully submitted that the Court of Appeals for the Second Circuit ignored the points raised in the Petitioners' brief and the Petitioners' Petition for Rehearing before that Court and accordingly did err in the entry of the Opinion rendered herein and in the Order in and by which the Petitioners' Petition for Rehearing was denied.

It is therefore, further respectfully submitted, that the Writ herein sought should be issued and the decision of the United States Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

NICHOLAS J. CAPUANO
Attorney for Petitioners
19 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF SERVICE

In accordance with Rule 21 and Rule 33 (2) (a), Supreme Court Rules, the undersigned attorney for the Petitioners hereby certifies that forty (40) printed copies of the above and foregoing Petition for Writ of Certiorari were furnished by air mail, by depositing same in the United States Post Office, with first class postage prepaid, addressed to the Honorable Michael Rodak, Jr., Clerk of the Supreme Court of the United States, Washington, D.C. 20543, and that three (3) true and correct copies of the above foregoing Petition for Writ of Certiorari were furnished in the same manner, to the Honorable Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D.C. 20530, on this ____ day of July, 1972.

NICHOLAS J. CAPUANO

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 752 & 874—September Term, 1971.
(Argued May 15, 1972 Decided June 15, 1972.)
Docket Nos. 72-1220, 72-1523

UNITED STATES OF AMERICA,

Appellee,

v.

NORMAN ROTHMAN and
FABIO DE CRISTOFARO,

Appellants.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeals from convictions in the United States District Court for the Southern District of New York, Edward C. McLean, Judge, sitting with a jury, for conspiracy to transport, and transportation of, stolen securities in interstate and foreign commerce, and possession of securities stolen from interstate commerce and the mail, in violation of 18 U.S.C. §§371, 2314, 1708, and 659 (1970).

Affirmed.

NICHOLAS J. CAPUANO, Miami, Florida, for Appellants.

JOHN H. GROSS, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, David M. Brodsky and Peter F. Rient, Assistant United States Attorneys, on the brief), for Appellee.

HAYS, Circuit Judge:

Appellants Rothman and De Cristofaro were convicted in the United States District Court for the Southern District of New York after a jury trial of conspiracy to transport and transportation of stolen securities in interstate and foreign commerce, and possession of securities stolen from interstate commerce and the mail, in violation of 18 U.S.C. §§371, 2314, 1708, and 659 (1970). Appellant Rothman was convicted of conspiracy and six substantive counts, and sentenced to concurrent prison terms of five years on each count. Appellant De Cristofaro was convicted of conspiracy and two substantive counts, and sentenced to concurrent terms of three years on each count. Appellants do not contest the sufficiency of the evidence to support the convictions. They contend, however, that the trial judge erred in failing to instruct the jury that a guilty plea of a co-defendant is inadmissible as evidence of appellant's guilt. In addition, appellant Rothman contends that the district court erred in granting the government's pre-trial motion to compel appellant to furnish handwriting exemplars. For the reason set forth below, we affirm the convictions.

I.

During the opening statement to the jury, the prosecuting United States attorney said:

> "The defendants, Norman Rothman and Fabio De Cristofaro, are charged, along with Lawrence Mitchell and Chester Gray, with conspiring to transport approximately $3,000,000 of stolen securities across state lines and to Europe.
>
> They are also charged with causing the transportation of certain stolen securities across state lines.
>
> Chester Gray and Lawrence Mitchell have already pleaded guilty to conspiring with these defendants."

At that point defense counsel objected generally to the statement and asked the court to declare a mistrial, which request was denied. During the trial the government called both Mitchell and Gray to testify for the prosecution, and each testified that he had pleaded guilty to an indictment charging conspiracy to transport stolen securities in interstate and foreign commerce. Defense counsel did not object to this questioning, nor did counsel request the trial judge to give a cautionary instruction to the jury to the effect that this testimony could not be considered as evidence of appellants' guilt.

After all the evidence had been received, the trial judge discussed with counsel the proposed charge to the jury.

"I will tell [the jury] that two of the defendants [mentioned in the conspiracy indictment], Gray and Mitchell, have pleaded guilty to certain counts and are not on trial, and that that leaves Rothman and De Cristofaro as the defendants who are on trial.

* * *

Then we finally take up the conspiracy count . . . I will give [the jury] the usual charge on conspiracy I always use . . .

* * *

. . . I do not propose to discuss the evidence."

Defense counsel did not object to the proposed charge and did not request a cautionary instruction. When the trial judge charged the jury exactly as he indicated he would, no exception was taken to the absence of a cautionary instruction.

Appellants' contention that the court erred in not granting the request for a mistrial after the prosecutor's reference in the opening statement to the guilty pleas of Gray and Mitchell is without merit. The government is entitled, in its opening statement to the jury, to describe the witnesses and evidence it will introduce during the trial. The government is entitled on direct examination of its witnesses to elicit information that could be damaging to the witnesses' credibility, such as a guilty plea to an indictment, "to prevent the defense from creating a misleading impression, or the jurors from thinking, that the Government is seeking to keep something from the jury." United States v. Del Purgatorio, 411 F.2d 84, 87 (2d Cir. 1969); United States v. Freeman, 302 F.2d 347, 350 (2d

Cir. 1962), cert. denied, 375 U.S. 958 (1963). See United States v. Crosby, 294 F.2d 928, 948 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962).

Although the trial court would have been required to give a cautionary instruction had such an instruction been requested, United States v. Freeman, supra, at 350, the failure to request such an instruction when Gray and Mitchell testified or when the trial judge discussed his proposed charge, and the failure to take exception to the charge as delivered, constitutes a waiver of that right. United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965) (et banc), cert. denied, 383 U.S. 907 (1966); United States v. King, 420 F.2d 946, 947 (4th Cir.), cert. denied, 397 U.S. 1017 (1970). The failure to give a cautionary instruction was not such "plain error" by the trial judge as to require reversal of these convictions. United States v. Indiviglio, supra; United States v. King, supra; United States v. Kimbrew, 380 F.2d 538, 540 (6th Cir. 1967). The government, on direct examination of Gray and Mitchell and in summation to the jury, did not stress the fact that the two had pleaded guilty; nor did the government at any time suggest to the jury that it could infer appellants' guilt from the guilty pleas of Gray and Mitchell.

II.

Before trial the government moved for an order requiring appellant Rothman to furnish handwriting exemplars. Rothman was compelled to furnish a sample of his signature and also to write five additional names, all of which had appeared as endorsements on cashier's checks or as signatures on hotel registration cards. An expert government witness testified that in his opinion the signa-

tures on the checks and cards which the government introduced were written by Rothman. Appellant contends that the order requiring him to furnish these exemplars violated his fifth amendment privilege against self-incrimination and the exemplars were therefore inadmissible at trial for purposes of comparison with the checks and registration cards.

Such a contention is untenable in light of Gilbert v. California, 388 U.S. 263, 267 (1967) and United States v. Izzi, 427 F.2d 293 (2d Cir.), cert. denied, 399 U.S. 928 (1970). "The lines drawn on the paper," United States v. Izzi, supra, at 295 n.1, were neither "testimonial [n]or communicative" and therefore outside the scope of the fifth amendment privilege. Gilbert v. California, supra at 267. See also United States v. Wade, 388 U.S. 218, 222-23 (1967); United States v. Doe (Devlin), 405 F.2d 436, 438 (2d Cir. 1968); United States v. Doe (Schwartz), (2d Cir., March 28, 1972) (Slip op. 2429, 2431).

Affirmed.

* * *

APPENDIX B

72-1220 & 72-1523

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NORMAN ROTHMAN, GLYSSON LAWRENCE MITCHELL, CHESTER ZOCHOWSKI, a/k/a CHESTER GRAY, FABIO DOMENICO DECRISTOFARO, ARTHUR TORTORELLO,
Defendants,

NORMAN ROTHMAN, FABIO DOMENICO DECRISTOFARO,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

July 5, 1972

/s/ Leonard P. Moore

LEONARD P. MOORE

/s/ J. Joseph Smith

J. JOSEPH SMITH

/s/ Paul R. Hays

PAUL R. HAYS

Circuit Judges

* * *

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 72-1220

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

NORMAN ROTHMAN,
FABIO DOMENICO DECRISTOFARO,
Defendant-Appellants.

Appeal from the United States District Court
for the Southern District of New York

APPELLANTS PETITION FOR REHEARING
NORMAN ROTHMAN
FABIO DOMENICO DECRISTOFARO

I

This Court, in affirming the trial court's conviction has concluded that 1) the appellant's contention that the court erred in not granting the request for a mistrial after the prosecutor's reference in his opening statement to the guilty pleas of Gray and Mitchell is without merit,

citing United States v. Del Purgatorio, 411 F.2d 84; United States v. Freeman, 302 F.2d 347 and United States v. Crosby, 294 F.2d 928; (2) that the appellants' failure to take exception to the charge as delivered, constituted a waiver of that right, citing United States v. Indiviglio, 352 F.2d 276, and United States v. King, 420 F.2d 946, and (3) the failure to give a cautionary instruction was not such "plain error" by the trial judge as to require reversal of these convictions, citing United States v. Indiviglio, supra; United States v. King, supra; and United States v. Kimbrew, 380 F.2d 538.

Your Petitioners earnestly and respectfully submit that this court overlooked or failed to consider any of the cases cited by your Petitioners in their brief and oral argument before this court that unless cautionary instructions are given to the jury that a plea of a co-conspirator or co-defendant is not admissible as evidence against the remaining defendants; that such pleas do not give rise to any inference as to the guilt of the remaining defendants on trial, and that in each of such cases the failure to give the cautionary charge was held to be error and a new trial was ordered.

Your Petitioners respectfully submit that the cases cited in the court's opinion are either inapplicable or certainly distinguishable.

In this Petition for Rehearing, the Petitioners will show their inapplicability or distinguishing feature by taking each of such cases in chronological order as they appear in the opinion.

In Del Purgatorio, the reason this court held that the defendants were not prejudiced where the Government elicited from the co-conspirator and one of his accomplices that they have already pleaded guilty to the conspiracy counts on which defendant was being tried, was because the Court gave two (2) cautionary instructions which adequately prevented any possible prejudice to defendant.

In the Freeman case it was held that there was no likelihood of the prejudice regarding Emma Ward's testimony about her State plea of guilty, nor could it have added anything to the story which she told in the case against Freeman, although there may be circumstances where on proper request of the defense, the trial judge should limit, or even bar such testimony, or allow it under cautionary instructions because the prejudice to the defendant of the witness' admission of crime implicating the defendant would outweigh the advantages of a full disclosure of the witness' criminal background.

In the Crosby case, this Court in referring to the McCarthy's guilty plea, stated that the change of plea was accepted out of the presence of the jury, because counsel for most of the defendants felt a cautionary instruction would only serve to call the jury's attention to—and emphasize—the guilty plea, and as a result, the Court did not inform the jury of the circumstances concerning McCarthy's subsequent absences from the case and courtroom.

However, this court went on to say the Federal Courts have uniformly held it was not error for the jury to be informed during the trial, that one or more defendants have pleaded guilty, or even for the jury to be present when the pleas were entered, if proper cautionary instruction were given.

Furthermore, in the Crosby case, proper cautionary instructions were given, and the fact that two of the defendants were acquitted weighs against the conclusion that the jury was prejudicially affected.

It appears this court affirmed the trial court's verdict solely on the basis that the defendants failed to request the cautionary charge, completely overlooking and ignoring the Freije case, where, although the trial judge referred to the plea in his charge, he did not give the usual cautionary instructions. In the Freije case, the 1st Circuit Court of Appeal stated:

> "It is surprising that defendants did not object to this procedure since it is well established that a plea of a codefendant is not admissible as evidence against the remaining defendants.
>
> "While not here deciding whether there was plain error within the meaning of Fed. R. Crim. P.52(b), we take occasion to mention this matter for the court's guidance in the new trial of this case."

Even in the Indiviglio case, this court stated that even without the explicit permission of Rule 52(b), it is within our "inherent power" to notice errors without objection if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.

In the King case, the United States Court of Appeals, Fourth Circuit, in affirming the conviction, stated:

> "We note that trial counsel did not ask for a cautionary instruction. Now it is contended that the omission was plain error, noticeable under F. R. Crim. P. 52(b), necessitating reversal. No authority has been cited, nor do we find any, which obligates the court to give such an instruction though unrequested."

Actually, in the King case, after careful inspection, reflects no authorities were cited for any of the assignments raised on appeal. The Petitioners would again respectfully remind this court that Freije v. United States, 386 F.2d 408 (1st Cir. 1967) is directly on point, in addition to the other cases cited by Petitioners in their brief, namely: Babb v. U.S., 218 F.2d 538 (5th Cir. 1955); U.S. v. Baete, 414 F.2d 782 (5th Cir. 1969); U.S. v. Washabaugh, 442 F.2d 1127 (9th Cir. 1971); Chavez v. U.S., 275 F.2d 813 (9th Cir.); Leonard v. U.S., 277 F.2d 834; U.S. v. Crosby, 294 F.2d 928 (2d Cir. 1961); U.S. v. Kahn, 381 F.2d 824 (7th Cir. 1967); U.S. v. Jones, 425 F.2d 1048 (9th Cir. 1970).

Not one of these cases, nor any of the other cases researched by this writer dictate or ordain that the burden is placed on the defendant to request a cautionary charge that a plea of a co-defendant or co-conspirator is not admissible as evidence against the remaining defendants, and that in the absence of such request, constitutes a waiver of that right.

The Indiviglio case fails to shed any light on this Court ruling that the failure to give a cautionary instruction was not such "plain error" by the trial judge as to require reversal of these convictions.

It would appear from reading the Indiviglio case that the judgment of conviction, which conviction was affirmed by this court, was affirmed on the grounds that the defendant failed to make a proper objection before the trial court to the admission of certain challenged evidence and that the failure to do so forecloses review of the asserted error. The case has nothing to do with any cautionary instruction to the jury since the only question involved in the appeal was the ruling on defendant's Motion to Suppress.

The Kimbrew case does not apply to the failure to give a cautionary instruction in the case at bar as will affirmatively appear from the facts, which facts are simple.

Kimbrew and his co-defendant Warrex were tried together. Shortly after the Government's opening statement and after several witnesses had testified, Warrex, through his attorney, indicated to the presiding judge that he wished to change his plea from not guilty to guilty.

The plea of guilty was made in open court, before the jury. Counsel for Kimbrew objected to this incident, and moved to set aside the jury on the ground that his client had been prejudiced thereby.

The Motion was denied, and no request was made that the judge instruct the jury that Warrex's change of plea could not be considered by it in weighing the merits of Kimbrew's case.

In the Kimbrew case, no cautionary instruction was needed since Warrex, the co-defendant, did not take the stand or testify against Kimbrew.

The Sixth Circuit Court of Appeals in affirming Kimbrew's conviction was aware and sensitive to the aggravating circumstances attending this sort of occurrence because of the danger that a jury will infer that the remaining co-defendants, who have not changed their pleas, are nevertheless guilty.

In other words, the Sixth Circuit Court of Appeals in affirming the lower court found that there was enough strong, clear and convincing evidence of Kimbrew's guilt, without Warrex's plea of guilty before the jury.

In the case at bar, not only was the jury informed that Mitchell and Gray, the two co-conspirators, would testify for the Government, as witnesses, but the jury was also told at the very outset of the case, that is to say, during the Government's opening statement, that Mitchell and Gray have already entered a plea of guilty and that each of them would further testify for the Government as to their conspiracy and participation in the crime as alleged in the indictment with the two remaining defendants Rothman and Decristofaro.

It is manifestly clear, that this is what the Sixth Circuit Court of Appeals was talking about when it stated:

> "But courts of review have been sensitive to aggravating circumstances attending this sort of occurrence because of the danger that a jury will infer that the remaining co-defendants, who have not changed their pleas, are nevertheless guilty."

It is without question that the aggravating circumstances in the case at bar entitle the defendants to a new trial, because of the undue emphasis placed upon the fact that the co-conspirators, Mitchell and Gray, had already pleaded guilty and would testify for the Government as to their conspiracy with the defendants Rothman and Decristofaro, not only during the Government's opening statement of the trial; and again calling attention to such guilty pleas during the taking of evidence, and again by the trial judge while instructing the jury, all of which was prejudicial to the defendants' right to be tried solely on the evidence against them.

II

This court in its opinion has ruled that appellant Rothman's contention that the order requiring him to furnish handwriting exemplars of his signature and also of five additional names violated his fifth amendment privilege against self-incrimination is untenable in light of Gilbert v. California, 388 U.S. 263, 267 (1967) and U.S. v. Izzi, 427 F.2d 293 (2d Circuit), cert. denied, 399 U.S. 928 (1970); U.S. v. Doe (Devlin), 405 F.2d 436, 438 (2d Cir. 1968), completely ignoring, overlooking and failing to mention in its opinion that the mentioned exemplars were taken at a critical stage of the proceedings, that is to say, on the day of trial.

To understand the ruling in Gilbert v. California, supra, one must, of necessity, first understand the facts, which are briefly, as follows:

Gilbert, whose given name was "Jesse James", (a fact the Supreme Court of the United States did not comment

on) was convicted of armed robbery of a Savings and Loan Association in Alhambra, California, on January 3rd and the murder of a police officer who entered during the course of the robbery.

After the January 3rd robbery, Gilbert removed himself from California and was arrested in Philadelphia, Pennsylvania, on February 26. He refused to answer any questions about the Alhambra robbery, but later, did answer questions about some Philadelphia robberies in which the robber used a handwritten note demanding that money be handed over to him, and during the later interrogation gave the FBI agent the handwriting exemplars.

The exemplars were admitted in evidence at trial over objection that they were obtained in violation of Gilbert's fifth and sixth amendment rights.

The California Supreme Court upheld admisson of the exemplars on the sole ground that Gilbert had waived any rights that he might have had not to furnish them.

The California Supreme Court did not, therefore, decide Gilbert's constitutional claims.

The Supreme Court of the United States passed the question of waiver since it concluded that the taking of the exemplars violated none of Gilbert's constitutional rights.

The appellant Rothman still maintains, as he did in his Brief, and again during oral argument, that Gilbert v. California does not apply for the following obvious and distinct reasons.

First, Gilbert voluntarily executed the handwriting exemplars.

Second, Gilbert was a suspect, not a defendant when he executed the handwriting exemplars, and

Third, the taking of the handwriting exemplars was not a critical stage of the proceedings.

Izzi and Devlin, supra, do not apply since each of the cases was based on an erroneous application of the Gilbert case.

Furthermore, Izzi did not ask this court (as did Rothman) to hold that the mere introduction of these exemplars at trial violated his fifth amendment privilege against self-incrimination.

Instead, he contended as a ground for reversal of his conviction, that the government improperly emphasized the differences between his normal signature and the exemplars, intentionally suggesting that he had attempted to disguise his normal handwriting and by so doing had indicated consciousness of guilt.

It is beyond belief that compelling Rothman to execute not only a handwriting sample of his own name, but to execute a handwriting sample of five other names, at a critical stage of the proceedings, that is to say, on the day of his trial, does not violate his fifth amendment privilege against self-incrimination, upon the assumption that the handwriting samples are not testimonial and communicative evidence in nature.

If such a ruling is allowed to stand, there is nothing left to prevent the Government, during the trial, in the presence of the jury, to require and compel the defendant to execute the exemplars.

The Petitioners, therefore, respectfully suggest that this court grant their Petition for Rehearing and restore it to the calendar for reargument and to make such other and further orders as are deemed proper under the facts and circumstances of this particular case.

Respectfully submitted,

LURIE & CAPUANO
Attorneys for Petitioners
Rothman and Decristofaro
1409 Biscayne Building
Miami, Florida 33130

By_____
NICHOLAS J. CAPUANO

CERTIFICATE OF SERVICE

The undersigned attorney for Petitioners, Norman Rothman and Fabio Domenico Decristofaro, hereby certifies that two copies of the above and foregoing Petition for Rehearing was furnished by mail, by depositing same in a United States Mail Box with first class postage prepaid, addressed to the Honorable Whitney North Seymour, Jr., United States Attorney, Southern District of New York, Federal Courthouse, New York City, New York 10007, on this ____ day of June, 1972.

NICHOLAS J. CAPUANO, ESQ.
Attorney for Petitioners

* * *

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 72-1220

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

NORMAN ROTHMAN,
FABIO DOMENICO DECRISTOFARO,
Defendant-Appellants.

Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLANTS
NORMAN ROTHMAN
FABIO DOMENICO DECRISTOFARO

ISSUES INVOLVED ON APPEAL

I

THE COURT ERRED IN FAILING TO DECLARE A MISTRIAL BECAUSE OF THE PREJUDICIAL MISCONDUCT OF THE PROSECUTING ATTORNEY IN HIS OPEN-

ING STATEMENT THAT DEFENDANTS AND CO-CONSPIRATORS, CHESTER GRAY AND GLYSSON LAWRENCE MITCHELL, HAD PLED GUILTY TO THE INDICTMENT AND WOULD TESTIFY FOR THE GOVERNMENT AND AGAINST THE TWO REMAINING DEFENDANTS.

II

THE COURT BY WAY OF EXPLANATION AT THE TIME HE CHARGED THE JURY, TO THE GUILTY PLEAS OF GRAY AND MITCHELL ERRED IN FAILING TO GIVE THE JURY THE REQUIRED CAUTIONARY INSTRUCTIONS THAT A PLEA OF A CO-DEFENDANT IS INADMISSIBLE AS EVIDENCE, AND THAT SUCH PLEAS DO NOT GIVE RISE TO ANY INFERENCE AS TO THE GUILT OF THE REMAINING DEFENDANTS ON TRIAL.

III

THAT THE COURT ERRED IN GRANTING THE GOVERNMENT'S MOTION TO COMPEL HANDWRITING EXEMPLARS OF THE DEFENDANT, NORMAN ROTHMAN, UPON THE GROUND THAT THE TAKING AND INTRODUCTION OF SUCH EXEMPLARS AT A CRITICAL STAGE OF THE PROCEEDINGS OR TRIAL VIOLATED THE DEFENDANT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

STATEMENT OF THE CASE

This is an appeal by NORMAN ROTHMAN and FABIO DOMENICO DECRISTOFARO from a Judgment of Conviction entered in the United States District Court for the Southern District of New York.

In the brief, the following symbols will be used:

"R" For Record-on-Appeal

"T" For Transcript of Record

"App." For Appendix

"GX" For Government's Exhibit

On the 18th day of December, 1969, a Grand Jury in the Southern District of New York returned a multi-count indictment charging NORMAN ROTHMAN, GLYSSON LAWRENCE MITCHELL, CHESTER ZOCHOWSKI, a/k/a CHESTER GRAY, FABIO DOMENICO DECRISTOFARO and ARTHUR TORTORELLO with one count of conspiracy to transport in interstate and foreign commerce securities and money of value in excess of Five Thousand ($5,000.00) Dollars, knowing such securities to have been stolen, converted and taken by fraud in violation of Title 18, United States Code, Section 371, and fourteen (14) substantive counts in violation of Title 18, United States Code, Section 2314 and 2, Section 659 and 2 and Section 1708 and 2. (R-1)

Of the fifteen (15) counts in the indictment, the Government at the opening of the trial withdrew eight (8) counts numbered 2, 5, 6, 8, 9, 11, 12 and 13. (T-517)

On November 17, 1971, the trial commenced before the Honorable EDWARD C. MC LEAN and was concluded on November 22, 1971, with a jury verdict of Guilty as to the Defendant, NORMAN ROTHMAN, on Counts 1, 3, 4, 7, 10, 14 and 15, and with a jury verdict of Guilty as to Defendant, FABIO DOMENICO DECRISTOFARO on Counts 1, 14 and 15. (T-546)

On January 7, 1972, the Defendant, ROTHMAN, was sentenced to imprisonment for a period of five (5) years on each of such counts to run concurrently with each other (App. 16, 17) and on January 14, 1972, he duly filed his Notice of Appeal. (App. 21, 22)

On January 7, 1972, the Defendant, DECRISTOFARO, was sentenced to imprisonment for a period of three (3) years on each of such counts to run concurrently with each other (App. 18, 19) and on January 13, 1972, he duly filed his Notice of Appeal. (App. 20)

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1291.

STATEMENT OF THE FACTS

On November 17, 1971, the day of the trial and just prior to the jury being impaneled, the Government moved the Court by way of written motion (App. 1) for an Order directing the Defendant, ROTHMAN, to execute handwriting exemplars, which motion was granted by the Court. (App. 2, 3)

On pain of contempt, and at a critical stage of the proceedings, that is to say, on the day of the trial, the Defendant, ROTHMAN, was compelled over the violent objection of his counsel, not only to give a handwriting sample of his name, (GX-49) but was also compelled to give handwriting samples of the following names:

Ed Fields (GX-50)

Ed Fisher (GX-51)

Nat Rossman (GX-52)

Frank Dino (GX-53)

Louis Freidman (GX-54)

It then appears, that as soon as the jury was impaneled to try the cause, the Court directed Government counsel to make his opening statement, to which counsel replied:

> "MR. GROSS: Your Honor, members of the jury: My name is John Gross. I am an assistant United States attorney. With me as counsel table will be David Brodsky, also an assistant United States attorney.
>
> We will present the case for the United States.
>
> The defendants, Norman Rothman and Fabio de Cristofaro, are charged, along with Lawrence Mitchell and Chester Gray, with conspiring to transport approximately $3,000,000 of stolen securities across state lines and to Europe.

They also are charged with causing the transportation of certain stolen securities across state lines.

Chester Gray and Lawrence Mitchell have already pleaded guilty to conspiring with these defendants. (Emphasis added)

MR. LURIE: We object to that statement, if the court please, and ask for a mistrial.

THE COURT: The motion is denied and the objection is overruled. Let's get the ground rules straight. I understand Mr. Brodsky is representing Mr. Rothman and I don't want Mr. Lurie hopping up and making objections.

Mr. Brodsky is the man to do it. Mr. Lurie can confer with him. Go ahead.

MR. GROSS: Both Mr. Gray and Mr. Mitchell will testify for the government and detail for you their participation in this conspiracy and the participation in this conspiracy of the defendants, Norman Rothman and Fabio de Cristofaro. (App. 9, 10) (Emphasis added)

At the conclusion of the case, the Court in its instructions to the jury informed them that "the indictment originally named five (5) defendants. The Defendant, ARTHUR TORTORELLO, was severed from this case before it was assigned to him; the Defendants, MITCHELL and GRAY, have pleaded guilty to certain counts in the indictment and so they are no longer on trial, leaving ROTHMAN and DECRISTOFARO. (T-516, 517)

ARGUMENT

I

THE COURT ERRED IN FAILING TO DECLARE A MISTRIAL BECAUSE OF THE PREJUDICIAL MISCONDUCT OF THE PROSECUTING ATTORNEY IN HIS OPENING STATEMENT THAT DEFENDANTS AND CO-CONSPIRATORS, CHESTER GRAY AND GLYSSON LAWRENCE MITCHELL, HAD PLED GUILTY TO THE INDICTMENT AND WOULD TESTIFY FOR THE GOVERNMENT AND AGAINST THE TWO REMAINING DEFENDANTS.

II

THE COURT BY WAY OF EXPLANATION AT THE TIME HE CHARGED THE JURY, TO THE GUILTY PLEAS OF GRAY AND MITCHELL ERRED IN FAILING TO GIVE THE JURY THE REQUIRED CAUTIONARY INSTRUCTIONS THAT A PLEA OF A CO-DEFENDANT IS INADMISSIBLE AS EVIDENCE, AND THAT SUCH PLEAS DO NOT GIVE RISE TO ANY INFERENCE AS TO THE GUILT OF THE REMAINING DEFENDANTS ON TRIAL.

The Defendants, ROTHMAN and DECRISTOFARO, contend that the District Court erred in refusing to declare a mistrial (App. 9) at an early stage of the trial, because of prejudicial statements made by the prosecuting attorney in his opening statement to the jury (App. 9-15) and the trial judge's failure to give the jury the required clear and strong cautionary instructions.

An opening statement should be limited to a statement of the facts which the Government in good faith expects and intends to prove and should not be argumentative in character nor designed to destroy the character of the Defendants before introduction of any evidence on the crime charged in the indictment.

Instead of limiting his statement to the facts and outlining the matters he expected to prove, the prosecuting attorney proceeded to inform the jury that GRAY and MITCHELL have already entered a plea of guilty and that each of them will testify for the Government as to their conspiracy and participation in the crime alleged in the indictment with the two remaining Defendants, ROTHMAN and DECRISTOFARO. (App. 9)

No one can know or say for certain how certain disclosures, incidents or statements may affect the collective mind of the jury.

The prejudicial comments made by the prosecuting attorney in his opening statement in this case so impressed the jury with the remaining Defendants' guilt that it could no longer perform its functions clear-mindedly and fairly.

The rationale of cautionary or curative instructions, on the other hand, is that the impression of the occurrence has not been so great that the jury cannot, as it were, bracket the occurrence and disregard it.

However, even if the cautionary instructions had been given, the prejudice of the jury could not have been removed except by brain surgery.

Counsel for the Defendant, ROTHMAN, objected immediately and moved the Court for a mistrial, which was denied. (App. 9)

At this point, the Court was presented with its first opportunity to give the jury the required cautionary instructions that a plea of guilty of a co-conspirator or co-defendant is not admissible as evidence against the remaining defendants and that such pleas do not give rise to any inference as to the guilt of the remaining defendants on trial, but failed to do so. Freije v. U.S., 386 F.2d 408 (1st Cir. 1967); Babb v. U.S., 218 F.2d 538 (5th Cir. 1955); U.S. v. Baete, 414 F.2d 782 (5th Cir. 1969); U.S. v. Washabaugh, 442 F.2d 1127 (9th Cir. 1971).

The second opportunity to give the jury the required cautionary charge was presented to the Court at the close of the evidence and during the Court's charge to the jury. The Court charged the jury as follows:

> ". . . In considering the testimony of Mr. Gray and Mr. Mitchell you should bear in mind that on their own testimony each of them was an accomplice in the commission of a crime. The testimony of an accomplice is to be scrutinized with great care, with close and searching scrutiny. If, however, after scrutinizing it you believe it, you are entitled to take that testimony into account just as you take into account any other testimony that you believe." (App. 14)
>
> • • •
>
> ". . . So much for general remarks. What is this case all about? I should explain to you that this indictment originally named five defendants.

One of them is a man called Arthur Tortorello, about whom we know absolutely nothing. His case was severed, that is, cut off from all the others a long time ago before this case was ever even assigned to me. And I know nothing about him nor do you, and we don't have to concern ourselves with him at all. I only mention him because I wouldn't want you to wonder if you saw his name in the indictment. But we don't know anything about him and he is not on trial.

Now, the other four named in the indictment are Mr. Rothman, Mr. Mitchell, Mr. Gray and Mr. DeCristofaro. As has been mentioned before, Mr. Mitchell and Mr. Gray have pleaded guilty to certain counts in the indictment and so they are no longer on trial. That leaves Mr. Rothman and Mr. DeCristofaro." (App. 14, 15)

Here again was presented an opportunity to the trial judge to instruct the jury that while opening statements of counsel should not be considered as evidence, the members of the Jury are instructed that a plea of guilty of a co-conspirator or co-defendant is not admissible as evidence against the remaining defendants and that such pleas do not give rise to any inference as to the guilt of the remaining defendants.

". . . A number of courts have determined that a co-conspirator's or co-defendant's entry of a guilty plea, even on occasion before the jury, was not prejudicial, in view of a cautionary instruction. E. g., Koolish v. United States, 8 Cir., 340 F.2d 513 (1965), cert. den., 381 U.S. 951, 85

S.Ct. 1805, 14 L.Ed.2d 724 (1965); Casados v. United States, 5 Cir., 300 F.2d 845 (1962), cert. den., 373 U.S. 938, 83 S.Ct. 1543, 10 L.Ed.2d 693 (1963); Davenport v. United States, 9 Cir., 260 F.2d 591 (1958), cert. den., 359 U.S. 909, 79 S.Ct. 585, 3 L.Ed.2d 573 (1959); Nemec v. United States, 9 Cir., 178 F.2d 656 (1949), cert. den., 339 U.S. 985, 70 S.Ct. 1006, 94 L.Ed. 1388 (1950). United States v. Kahn, 381 F.2d 824 (1967)

In Chavez v. United States, 275 F.2d 813, 818 (9th Cir.) the court stated:

> " 'The law has long recognized the fact that it is difficult when in the courtroom for anyone, juror or not, to disregard that which he has heard. Yet, if evidence is improperly placed before the jury, the least a defendant can expect from the trial judge in correcting the error is a firm, definite, and unequivocal instruction to the jury that it is their duty to disregard it, absolutely and completely, and that it is his opinion they can and must do so.
>
> While the above statement had reference to evidence improperly placed before the jury, it applies with equal force to the opening statement of the character made in the instant case."

The record is replete with references to the guilty pleas of the co-defendants and co-conspirators, MITCHELL and GRAY, and it is apparent that the trial was conducted on the basis that this was admissible evidence. In Freje, supra, the court said:

"It is generally held that it is proper to receive the guilty plea of a co-defendant, even in the presence of the jury, but this presupposes that cautionary instructions are given. United States v. Kahn, 381 F.2d 824, 836-838 (7th Cir. 1967); United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), cert. denied, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed. 523 (1962).[8] In this instance, although the trial judge referred to the plea in his charge, he did not give the usual cautionary instructions. It is surprising that defendants did not object to this procedure since it is well established that a plea of a codefendant is not admissible as evidence against the remaining defendants. United States v. Restaino, 369 F.2d 544 (3d Cir. 1966); Koolish v. United States, 340 F.2d 513 (8th Cir.), cert. denied, 381 U.S. 951, 85 S.Ct. 1805, 14 L.Ed.2d 538 (5th Cir. 1955); United States v. Toner, 173 F.2d 140 (3d Cir. 1949). While not here deciding whether there was plain error within the meaning of Fed.R.Crim. P. 52(b), we take occasion to mention this matter for the court's guidance in the new trial of this case." (Emphasis added)

"8. In Wood v. United States, 279 F.2d 359, 362 (8th Cir. 1960), the court quoted from the instruction given in the district court: 'These pleas do not give rise to any inference as to the guilt of the remaining defendants here on trial. The guilt or innocence of the defendants still on trial must be determined solely by you, solely by the evidence introduced in the trial of this case.'"

In Babb v. United States, 218 F.2d 538 (5th Cir. 1955) in reversing the Defendant's conviction said:

> "Appellant's co-defendant and alleged co-conspirator, Broussard, a witness for the Government, was permitted to testify over objection that he had pled guilty to all of the counts of the indictment. There was error. This court held in Leroy v. Government of Canal Zone, 5 Cir., 81 F.2d 914, that it was error to admit judgments of conviction of two other defendants not on trial. We see no difference between admitting a judgment of conviction and permitting a co-defendant to testify to the same thing. Practically all the decisions now hold that it is error for the court to instruct the jury that they may consider the fact that co-defendants have pled guilty.
>
> Appellant not only objected to Broussard's testimony as to his plea of guilty but requested the court to instruct the jury that they should not consider the fact for any purpose as bearing upon his guilt. We think this charge should have been given. A defendant is entitled to have the question of his guilt determined upon the evidence against him, not on whether a Government witness or co-defendant has pled guilty to the same charge.
>
> Reversed."

In United States v. Baete, supra, the appellant contended that the trial court committed plain error in permitting one Lindsey, who was jointly indicted with him

for the same offenses, to testify that he had earlier pled guilty. The court found no merit in this contention and affirmed the conviction because although Lindsey's testimony met with no objection from Baete's trial counsel, nor was it the subject of a requested charge, the court went on to say on page 783,

> "Nevertheless, the court instructed the jury not to consider Lindsey's guilty plea in determining the innocence or guilt of Baete." (Emphasis added.)

In the United States v. Washabaugh, supra, after most of the evidence was in, Pringle changed his plea in the Dyer Act count to guilty. The trial judge heard the plea in chambers and, when the trial resumed, informed the jury of Pringle's plea and strongly admonished the members not to consider it with respect to Washabaugh and Wentroble. Since all three defendants were charged with the same crime in the same count and had sought to escape conviction on the same ground (lack of knowledge that the car was stolen), Washabaugh and Wentroble insist that this information would necessarily lead the jury to find them guilty as well.

The court stated on page 1129,

> "Informing the jury that such pleas have been entered is not ordinarily erroneous where, as here, the statement is unadorned and accurate, and the jury is carefully instructed not to consider the plea in determining the guilt or innocence of the remaining defendants. United States v. Jones (9th Cir. 1970), 425 F.2d 1048." (Emphasis added.)

POINT III

THE COURT ERRED IN GRANTING THE GOVERNMENT'S MOTION TO COMPEL HANDWRITING EXEMPLARS OF THE DEFENDANT, NORMAN ROTHMAN, UPON THE GROUND THAT THE TAKING AND INTRODUCTION OF SUCH EXEMPLARS AT A CRITICAL STAGE OF THE PROCEEDINGS OR TRIAL VIOLATED THE DEFENDANT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The Government in its memorandum of law in support of its motion for an order directing the defendant, ROTHMAN, to execute handwriting exemplars relies heavily on United States v. Izzi, 427 F.2d 293 (2d Cir., 1970) and Gilbert v. California, 388 U.S. 263, decided June 12, 1967. (App. 1-4)

As a matter of fact, Judge McLean stated at the conclusion of the hearing on the Government's motion that it was his feeling that he was bound by the Second Circuit leading case of United States v. Izzi, supra. (App. 4-6)

In the Izzi case, the defendant was convicted of interstate transportation of stolen securities, and he appealed. In affirming the conviction, Judge Kaufman, Circuit Judge stated on page 295,

> "* * * Izzi does not ask us to hold that the mere introduction of these exemplars at trial violated his fifth amendment privilege against self-incrimination. Gilbert v. California, 388 U.S. 263,

> 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), forecloses this line of attack. Instead, he contends that the government improperly emphasized the differences between Izzi's normal signature and the exemplars, intentionally suggesting that he had attempted to disguise his normal handwriting and by so doing had indicated consciousness of guilt. * * *" (Emphasis added)

Gilbert v. California, supra, does not apply for two obvious and distinct reasons. The first one being that Gilbert voluntarily executed the handwriting exemplars, and secondly, the Supreme Court held that the preindictment taking of handwriting exemplars from a defendant was not a critical stage of the proceedings. (Emphasis added)

In United States v. Green, 282 F.Supp. 373 (1968), the United States District Court S. D. Indiana, on the Government's motion to require the defendant to submit handwriting exemplars held that the defendant would not be compelled to give handwriting exemplars displaying selected phrases allegedly germane to the prosecution.

The opinion is so well written that this writer deems it necessary and appropriate to reproduce it in its entirety.

UNITED STATES v. GREEN
Cite as 282 F.Supp.373 (1968)

UNITED STATES OF AMERICA

v.

Joseph C. GREEN

No. IP 67-CR-167

United States District Court
S. D. Indiana,
Indianapolis Division.

April 12, 1968.

Prosecution for filing false and fraudulent claims with the United States and with conspiring with another to do so. On the United States' motion to require defendant to submit handwriting exemplars, the District Court, Steckler, Chief Judge, held that defendant would not be compelled to give handwriting exemplars displaying selected phrases allegedly germane to the prosecution.

Motion overruled.

1. Criminal Law — 393(1)

The privilege against self-incrimination reaches only compulsion of 'communication' or 'testimony' but these are to be distinguished from 'identifying physical characteristics' or compulsion which makes the accused the source of 'real or physical evidence'. U.S.C.A. Const. Amend. 5.

2. Criminal Law — 393(3)

To compel person to submit to testing in which an effort will be made to determine his guilt or innocence on basis of physiological response, whether willed or not, violates privilege against self-incrimination. U.S.C.A. Const. Amend. 5.

3. Criminal Law — 393(1)

The privilege against self-incrimination is as broad as the mischief which it seeks to guard. U.S.C.A. Const. Amend. 5.

4. Criminal Law — 393(1)

Defendant charged with having filed false and fraudulent claims with the United States would not be compelled to give handwriting exemplars displaying selected phrases allegedly germane to the prosecution. 18 U.S.C.A. §§ 287, 371; U.S.C.A. Const. Amend. 5.

5. Criminal Law — 393(1)

The procurement of a handwriting exemplar without voluntary cooperation of the accused is an infringement upon the constitutional prohibition against compelling the accused to be a witness against himself. U.S.C.A. Const. Amend. 5."

"Daniel P. Byron, Asst. U.S. Atty., for the United States.

John C. Ruckelshaus, of Ruckelshaus, Babbitt & O'Connor, Indianapolis, Inc., for Joseph C. Green.

ORDER OF APRIL 12, 1968 OVERRULING MOTION TO REQUIRE DEFENDANT TO SUBMIT HANDWRITING EXEMPLARS

STECKLER, Chief Judge.

The defendant is charged by way of indictment with having filed false and fraudulent claims with the United States in violation of Title 18, United States Code, Section 287, and with conspiring with another to do so in violation of Title 18, United States Code, Section 371.

The case is before the Court on the Government's motion to require the defendant to submit handwriting exemplars. The motion requests that the handwriting exemplars be submitted as requested by the Government's chief investigative agent including, inter alia, the names which defendant allegedly wrote on the credit invoices used in the alleged conspiracy.

It is the position of the Government that the giving of handwriting exemplars is outside the scope of the Fifth Amendment privilege against self-incrimination. In support of its contention, the Government relies on Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) and Gilbert v. State of California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967).

[1] The Supreme Court has concluded that the privilege against self-incrimination reaches only compulsion of 'communications' or 'Testimony' and that these are to be distinguished from 'identifying physical characteristics' or compulsion which makes the accused the source of 'real or physical evidence.' Schmerber, supra, 384 U.S. at 764, 86 S.Ct. 1826; Gilbert, supra, 388 U.S. at 266, 87 S.Ct. 1951.

The Government urges that handwriting exemplars in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristics outside the Fifth Amendment's protection and is not protected by the privilege against self-incrimination.

In opposition to the motion the defendant distinguishes the Gilbert decision from the case at bar by pointing out that the defendant in Gilbert voluntarily gave handwriting exemplars before he was indicted and later asserted his objection when the exemplar was offered into evidence at the trial. The Fifth and Eighth Circuits have interpreted Gilbert, however, in both cases the giving of handwriting exemplars was voluntary on the part of the defendants, Granza v. United States, 5 Cir., 377 F.2d 746, reh. 381 F.2d 190 (5th Cir. 1967); Weaver v. United States, 379 F.2d 799 (8th Cir. 1967).

In addition to the absence of an effective waiver, defendant contends that the giving of handwriting exemplars where the corpus of the crime alleged requires proof of the unlawful signatures goes considerably beyond use as a mere 'identifying physical characteristic.' Further, that in view of the scientific certainty which accompanies handwriting analysis, it is 'communicative' as to an element of the crime and is incriminating.

[2] The distinctions between compulsions of a communicative nature which are protected and those which product only 'identifying physical characteristics,' or become the source of 'real or physical characteristics,' which are not protected by the Fifth Amendment, are nebulous. In view of the nature of the request in the case at bar, the Court concludes that the exemplars fall within the exceptions noted by the Supreme Court in Schmerber, supra, 384 U.S. at 764, 86 S.Ct. at 1832:

'There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain 'physical evidence' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses wnich are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.'

[3] For the sake of analysis, assume the hypothetical of a man charged with forging his name to a gasoline sales receipt. If he were asked outright whether he had forged the name appearing on the receipt, there is no question that he could refuse to answer because of the constitutional privilege against self-incrimination. If rather than request a verbal response, the examiner told him to write his reply, the privilege would still prevail. Is the question presently confronting this court, i.e., can the examiner tell him to write the name as it appears on the sales receipt, any different? Defendant urges that with the exactness and definiteness that can now be scientifically obtained by handwriting analysis, the result of requiring the accused to write the name would have the same far-reaching effect as if the accused where required to make a verbal or written admission. Such result fails to satisfy the principle that the protection 'is as broad as the mischief against which it seeks to guard.' Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892).

[4,5] The defendant was employed by the United States for a considerable period of time, and the Government has not sought to deny that it has samples of his handwriting available through this employment. What is here sought is an exemplar displaying selected phrases allegedly germane to this case. To lend the compulsory processes for the Court to the procurement of such an exemplar without the voluntary cooperation of the accused would be an infringement upon the spirit of the constitutional prohibition against compelling the accused to be a witness against himself.

For the foregoing reasons, the Government's motion to require the defendant, Joseph C. Green, to submit handwriting exemplars is hereby overruled.

It is so ordered."

The narrow legal issue raised here then is whether the Fifth Amendment is violated by compelling the Defendant, ROTHMAN, at a critical stage of the proceedings, to execute not only a handwriting sample of his own name, but to execute a handwriting sample of five other names. How it can be logically and legally argued that compelling a defendant to write not only his name but five other names does not violate the Fifth Amendment since the handwriting samples are not testimonial and communicative evidence is beyond belief.

In Lewis v. United States, 382 F.2d 817 (1967), the United States Court of Appeals, District of Columbia Circuit, in affirming defendant's conviction of three offenses arising out of attempted armed robbery held that a compelling of suspect to make a handwriting sample does

not violate the Fifth Amendment because the handwriting example is not a "communication," and that taking of defendant's handwriting exemplar in absence of counsel did not violate his Sixth Amendment right. (Emphasis added.)

The Lewis case, supra, is cited because even in that case the court on page 819 stated "It may be that obtaining it by force would probably nullify the validity of a handwriting sample" (Emphasis added.) It should be noted the taking of the sample was not a critical stage of the proceedings, and it was taken when Lewis was a suspect, not a defendant.

If, compelling the Defendant, ROTHMAN, on the day of his trial to furnish the Government with handwriting exemplars is not a critical stage of the proceedings, then I respectfully ask this court to answer the question "When does it become a critical stage of the proceedings"?

The Government may wish to respond by saying that while ROTHMAN's writing was communicative for another purpose, it was used in the trial merely as a handwriting standard for identification and not to communicate any information related to the issues then being tried.

This court is asked to reject any such argument upon the grounds that Government Exhibits 36, 37 and 38, the three cashiers checks to Louis Friedman, Nat Rossman and Frank Dino over the objections of counsel, were used to corroborate the testimony of the co-conspirator CHESTER GRAY as to ROTHMAN's participation in the conspiracy. (T - 73, 75, 76)

CONCLUSION

It is respectfully submitted that the errors here are of sufficient gravity to remand this case for a new trial.

Respectfully submitted

LURIE & CAPUANO
Attorneys for Appellants,
Rothman and Decristofaro
1409 Biscayne Building
Miami, Florida 33130

By _____
NICHOLAS J. CAPUANO

CERTIFICATE OF SERVICE

The undersigned attorney for the Appellants, Norman Rothman and Fabio Domenico Decristofaro, hereby certifies that two copies of the above and foregoing Brief of Appellants was furnished by mail, by depositing same in a United States Mail Box with first class postage prepaid, addressed to the Honorable Whitney North Seymour, Jr., United States Attorney, Southern District of New York, Federal Courthouse, New York City, New York 10007, on this ____ day of March 1972.

NICHOLAS J. CAPUANO, ESQ.
Attorneys for Appellants,
Rothman and Decristofaro,
19 West Flagler Street
Suite 1409
Miami, Florida 33130

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 72-1220

NORMAN ROTHMAN and
FABIO DOMENICO DECRISTOFARO,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

AFFIDAVIT OF NOTICE OF MOTION TO RECALL MANDATE

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

NICHOLAS J. CAPUANO, Attorney for Appellants, being duly sworn upon oath, deposes and says:

1. That the Appellants, NORMAN ROTHMAN and FABIO DOMENICO DECRISTOFARO, respectfully make application to this Court for the entry of an appropriate Order in and by which the mandate of this Court be stayed for a period of thirty days, to enable the mentioned Appellants to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and in support of such Motion to Recall Mandate, and further says:

2. That on the 15th day of June, 1971, the Court rendered its opinion in the above numbered and entitled cause in and by which the judgment of conviction (from the United States District Court, Southern District of New York) was affirmed.

3. That on the 26th day of June, 1972 the Appellants filed their timely Petition for Rehearing, which the Clerk of this Court has communicated to the undersigned, that it was received and filed on the 27th day of June, 1972 and as of the date of this Notice of Motion to Recall Mandate, the Court has not ruled upon.

4. That on the 16th day of June, 1972 a copy of a Notice of Motion for an Order directing that the mandate in the above captioned case issue forthwith, was mailed to the undersigned, for the Appellants.

5. That such Notice of Motion reflects that such Motion would be made before the Court at a time and place to be set by this Court.

6. Counsel for the Appellants was under the impression that the Court would set the oral argument on such Motion and inadvertently failed to reply to such Motion.

7. In the alternative, counsel for the Appellants filed his Petition for Rehearing pursuant to Rule 40 and 41 of the Federal Rules of Appellate Procedure within the time prescribed by law, and Rule 41 provides that if a Petition for Rehearing is denied, the mandate shall issue seven days after the entry of the Order denying the Petition unless the time is shortened or enlarged by Order.

8. On the morning of June 30, 1972, the undersigned attorney, received by mail a copy of an Order reflecting that the Motion made by the Appellee, dated June 16th, 1972 to issue the mandate forthwith, was granted.

WHEREFORE, the Appellants respectfully move this Court for the entry of an appropriate Order recalling and vacating the Order dated June 27, 1972 granting Appellee's Motion to issue the mandate forthwith, and for the entry of this Court's Order in and by which the mandate of this Court be stayed for a period of thirty days to enable the mentioned Appellants to apply for and obtain a writ of certiorari from the Supreme Court of the United States, in the event their timely Petition for Rehearing is denied.

The Appellants further represent unto this Court, that they will file their application for and obtain a writ of certiorari from the Supreme Court of the United States within thirty days from the date of this application, or certainly within the time allowed by this Court in the event the mandate is stayed.

The Appellants further represent, that they have a good and meritorious application to obtain a writ of certiorari from the Supreme Court of the United States as more fully appears by their timely Petition for Rehearing.

Respectfully submitted,

NICHOLAS J. CAPUANO
Attorney for Appellants
19 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF SERVICE

The undersigned attorney for Appellants NORMAN ROTHMAN and FABIO DOMENICO DECRISTOFARO, hereby certifies that a true and correct copy of the above and foregoing Affidavit of Notice of Motion to Recall Mandate was furnished by air mail, special delivery, by depositing same in a United States Post Office, with first class postage prepaid, addressed to the Honorable Whitney North Seymour, Jr., United States Attorney, Southern District of New York, Federal Courthouse, New York City, New York 10007, on this 30th day of June, 1972.

NICHOLAS J. CAPUANO

SWORN TO AND SUBSCRIBED before me this 30 day of June, 1972, at Miami, Florida.

Notary Public, State of
Florida at Large

My Commission expires:

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 69 Cr 899

UNITED STATES OF AMERICA
v.
NORMAN ROTHMAN

Filed Jan 7, 1972

On this 7th day of January, 1972, came the attorney for the government and the defendant appeared in person and[1] by Abraham Brodsky, Esq., counsel.

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty, and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly transporting in interstate commerce goods & securities of a value of more than $5,000., knowing the same to have been stolen, converted and taken by fraud, (Title 18, U.S. Code, Secs. 2314 & 2); unlawfully, wilfully & knowingly having in his possession shares of common stock of a value in excess of $100., knowing the same to have

[1]Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a

been embezzled & stolen from an interstate shipment of freight & express, (Title 18, United States Code, Sections 659 and 2); unlawfully, wilfully & knowingly possessing securities which had been stolen, taken, embezzled and abstracted from the mails, knowing the same to have been stolen, taken, embezzled & abstracted. (Title 18, United States Code, Secs. 1708 and 2); unlawfully, wilfully & knowingly conspiring so to do. (Title 18, United States Code, Section 371) as charged[3] in cts. 1, 3, 4, 7, 10, 14 and 15 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] FIVE (5) YEARS on each of counts 1, 3, 4, 7, 10, 14 and 15 to run concurrently with each other. Defendant is continued on present bail until he posts bail pending appeal fixed at $500,000.00 personal recognizance bond, plus a $100,000.00 surety bond.

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factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively, and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(Signature illegible)

United States District Judge

John Livingston,

Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 69 Cr. 899

UNITED STATES OF AMERICA
v.
FABIO DOMENICO DECRISTOFARO

Filed Jan 7, 1972

On this 7th day of January, 1972, came the attorney for the government and the defendant appeared in person and[1] by Elliot A. Taikeff, Esq., counsel.

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty, and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly having in his possession shares of common stock of a value in excess of $100., knowing the same to have been

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[1]Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a

embezzled & stolen from an interstate shipment of freight and express, (Title 18, U.S. Code, Secs. 659 and 2); unlawfully, wilfully & knowingly possessing securities which had been stolen, taken, embezzled and abstracted from the mails, knowing the same to have been stolen, taken, embezzled and abstracted, (Title 18, U.S. Code, Secs. 1708 & 2); unlawfully, wilfully and knowingly conspiring so to do. (Title 18, United States Code, Section 371) as charged[3] in cts. 1, 14 and 15 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] THREE (3) YEARS on each of counts 1, 14 and 15 to run concurrently with each other. Defendant continued on present bail until he posts bail pending appeal fixed at $50,000.00.

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factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively, and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(Signature illegible)

United States District Judge

John Livingston,

Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 13th day of July, one thousand nine hundred and 72

United States of America,
Plaintiff-Appellee,

v.

Norman Rothman, Glysson Lawrence Mitchell, Chester Zochowski, a/k/a Chester Gray, Fabio Domenico Decristofaro, Arthur Tortorello,
Defendants,

Norman Rothman, Fabio Domenico Decristofaro,
Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellants by notice of motion dated June 30, 1972, to recall the mandate from the United States District Court for the Southern District of New York and to stay its reissuance pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is denied.

July 11, 1972

PAUL R. HAYS
J. JOSEPH SMITH

Circuit Judges

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-148

NORMAN ROTHMAN and FABIO DOMENICO DECRISTOFARO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring and knowingly transporting stolen securities in interstate commerce, in violation of 18 U.S.C. 371 and 2314, and of possessing securities known to have been stolen from interstate commerce and the mail, in violation of 18 U.S.C. 659 and 1708. Petitioner Rothman (who was convicted on seven counts) was sentenced to concurrent prison terms of five years; petitioner DeCristo-

faro (who was convicted on three counts) received concurrent terms of three years. The court of appeals affirmed (Pet. App. A 1-6).

1. Petitioners do not dispute the sufficiency of the evidence. They contend that it was error for the prosecutor, in his opening statement, to mention the fact that two co-defendants who were to testify as government witnesses had pleaded guilty to conspiring with petitioners, and for the trial judge, following the testimony of the two co-defendants indicating that they had pleaded guilty, to fail *sua sponte* to give an instruction that such pleas could not be considered as bearing on petitioners' guilt. These contentions are adequately answered in the opinion below on which we rely (Pet. App. A 3-5). We point out in addition that the cases relied on by petitioners (Pet. 14) as standing for the proposition that refusal to give an unrequested instruction with respect to the guilty pleas of co-defendants is plain error do not so hold. On the contrary, the decisions dealing with this precise issue uniformly hold that the failure to give a cautionary instruction in these circumstances is not plain error. *United States* v. *King*, 420 F. 2d 946, 947 (C.A. 4), certiorari denied, 397 U.S. 1017; *United States* v. *Kimbrew*, 380 F. 2d 538, 540 (C.A. 6).

2. Petitioner Rothman makes an additional claim that it was a denial of his Fourth and Fifth Amendment rights for the district court to require him on the day of trial, but before the jury was empaneled, to furnish handwriting exemplars which were sub-

sequently introduced into evidence. All of petitioner Rothman's constitutional contentions raised below have been resolved against him by this Court.

The point is made that this was a "critical stage" in the proceedings, but we note first that petitioners were represented by counsel at the time. In any event, as the court of appeals pointed out (Pet. App. A 6), this Court rejected petitioner's implied Sixth Amendment claim in *Gilbert* v. *California*, 388 U.S. 263, 267:

> * * * The taking of the exemplars was not a "critical stage" of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial. Cf. *United States* v. *Wade*, *supra*. If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. * * *[1]

[1] Although the Court noted that the exemplars there were taken before indictment, it did not rest its decision on this fact but on the rationale that the taking of exemplars is not a "critical stage" in terms of the Sixth Amendment right to counsel since there is no meaningful role for counsel to play. See also *United States* v. *Izzi*, 427 F. 2d 293, 295 (C.A. 2), certiorari denied, 399 U.S. 928, where the Second Circuit upheld the use of exemplars, taken, as in this case, after indictment.

Gilbert also squarely rejected the argument based upon the Fifth Amendment privilege, pointing out (*id.* at 266-267) that:

> The privilege reaches only compulsion of "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers," and not "compulsion which makes a suspect or accused the source of 'real or physical evidence' . . . ." *Schmerber* v. *California*, 384 U.S. 757, 763-764. * * * A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the protection of the privilege]. * * *

Petitioner Rothman's Fourth Amendment claim was not raised in the district court or in the court of appeals either in petitioners' main brief (Pet. App. D, pp. 22, 35-36) or in the petition for rehearing (Pet. App. C, pp. 16-19). Only the Fifth Amendment privilege against self-incrimination formed the basis of petitioner Rothman's objections below. Contentions as to unreasonable search and seizure are normally waived if not raised prior to trial. *Nardone* v. *United States*, 308 U.S. 338, 341-342; *Segurola* v. *United States*, 275 U.S. 106, 111-112. This is particularly true where the alleged error could have been cured had a timely objection been made. *Chew* v. *United States*, 298 F. 2d 334 (C.A. D.C.); *United States* v. *Sten*, 342 F. 2d 491, 493 (C.A. 2); *United States* v. *Mitchell*, 432 F. 2d 354, 356 (C.A. 1).

Although it is not here conceded that the Fourth Amendment extends to the taking of handwriting exemplars, if the issue had been raised, the government could have made any necessary showing by pointing out (1) that the indictment established probable cause to believe petitioners were guilty of the offenses charged (*Ex parte United States*, 287 U.S. 241, 250); (2) that a material issue existed as to the authorship of certain signatures on cashier's checks and hotel registration cards; and (3) that identifying the handwriting on such checks and registration cards constituted part of the government's attempt to establish petitioner's participation in the commission of the offenses.[2] Thus, petitioner Rothman was properly ordered by the district court to provide the handwriting exemplars.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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[2] Since the question was not raised in the lower courts, the decision below cannot be said to conflict with *In re Dionisio*, 442 F. 2d 276 (C.A. 7), certiorari granted May 30, 1972, *sub nom. United States* v. *Dionisio* (No. 71-229), and *Mara* v. *United States*, 454 F. 2d 580 (C.A. 7), certiorari granted May 30, 1972 (No. 71-850). Those decisions of the Seventh Circuit held that the Fourth Amendment imposes on the government the burden of showing "reasonableness" to justify a grand jury subpoena and court order that a witness execute handwriting exemplars.

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in the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-148

NORMAN ROTHMAN and
FABIO DOMENICO DECRISTOFARO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF AN ORDER DENYING PETITION FOR WRIT OF CERTIORARI

NICHOLAS J. CAPUANO
19 West Flagler Street
Miami, Florida 33130
Attorney for Petitioners

MIAMI REVIEW — 371-4853 — 377-3721

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-148

NORMAN ROTHMAN and
FABIO DOMENICO DECRISTOFARO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF AN ORDER DENYING PETITION FOR WRIT OF CERTIORARI

PETITION FOR REHEARING

Your petitioners respectfully urge that this Court grant a rehearing in this cause on the following grounds:

1. This Court has granted certiorari filed in behalf of the government in **Mara v. United States**, 454 F.2d 580 (7th Cir.), and **In re Dionisio**, 442 F.2d 276 (7th Cir.).

2. Those cases, in which certiorari was granted to the government, are controlling here, the only apparent distinction between those cases and your petitioners' position is that:

a) In those cases in which certiorari was granted at the request of the government, and cited on Pages 11 and 12 of your petitioners' Petition for Writ of Certiorari, the parties involved were mere witnesses and not defendants charged with crime as were your petitioners; and

b) The government petitioned for certiorari from rulings from inferior courts whose holdings were in favor of your petitioners' position.

3. A defendant in a criminal case should have at least as much consideration for review of an unfavorable decision, as does the government, especially where the defendants — petitioners here — have a stronger position than those who prevailed below in cases wherein this Court has granted review to the government.

4. **Mara v. United States** and **In re Dionisio**, supra, were orally argued before this Court on Monday, November 6, 1972. The issues involved therein are identical to the issues involved here, except for the distinction pointed out in Paragraph 2a of this Petition for Rehearing.

5. Unless this Court has adopted a double standard whereby the government receives more consideration for review of adverse rulings than do persons charged with crime whose rights are allegedly protected by Amendments 1 through 10, Constitution of the United States, this Court should grant this Petition for Rehearing.

Respectfully submitted,

NICHOLAS J. CAPUANO
Attorney for Petitioners
19 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF SERVICE

In accordance with Rules 33 and 58, Supreme Court Rules, the undersigned attorney for the Petitioners hereby certifies that forty (40) printed copies of the above and foregoing Petition for Rehearing were furnished by air mail, by depositing same in the United States Post Office, with first class postage prepaid, addressed to the Honorable Michael Rodak, Jr., Clerk of the Supreme Court of the United States, Washington, D.C. 20543, and that three (3) true and correct copies of the above foregoing Petition for Rehearing were furnished in the same manner, to the Honorable Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D.C. 20530, on this ____ day of November, 1972.

The undersigned further certifies that this Petition is presented in good faith and not for delay and is confined to intervening circumstances of substantial or controlling effect and previously presented.

NICHOLAS J. CAPUANO